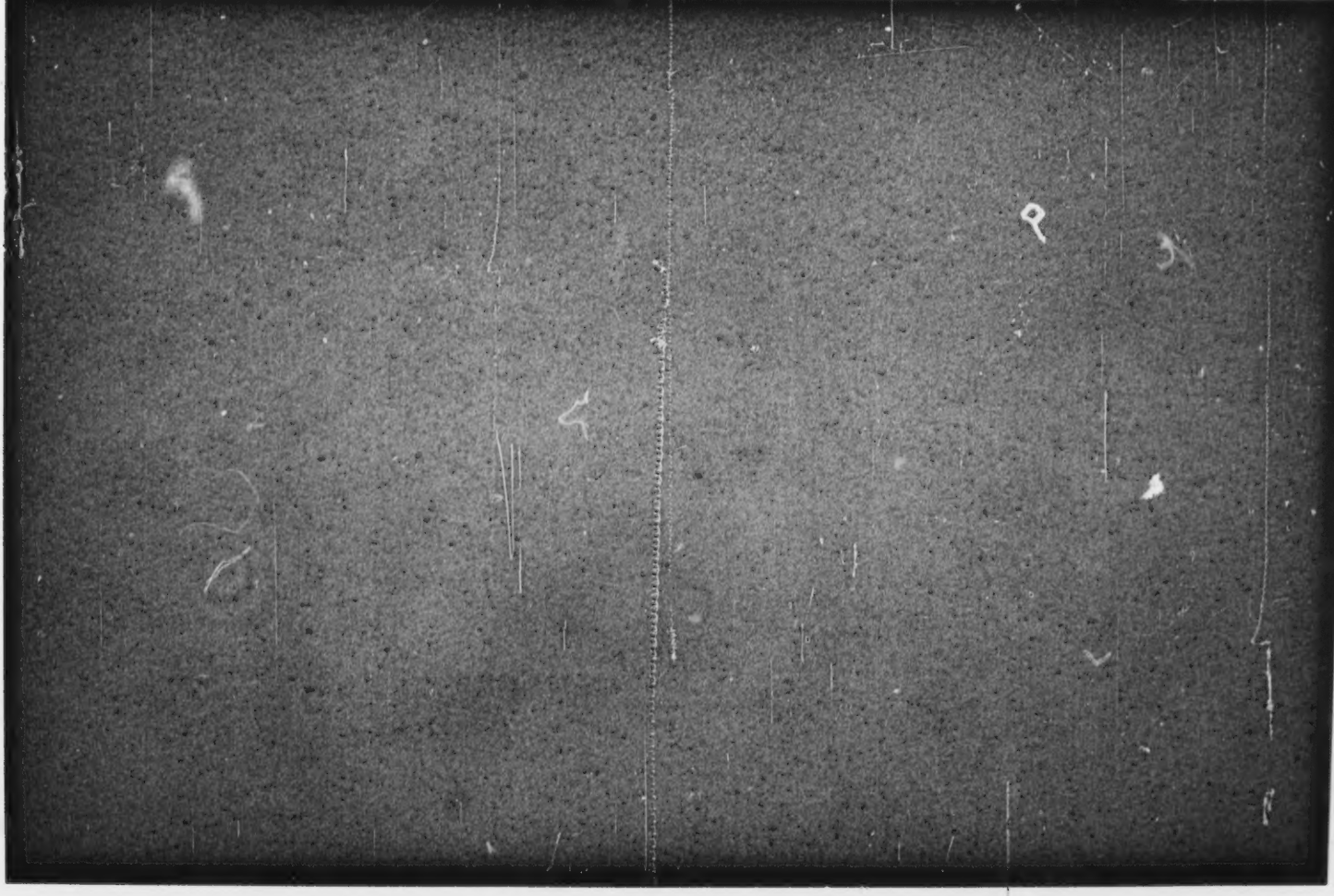

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-600

CARL LATURNER, *et al*,
Petitioners,

v.

BURLINGTON NORTHERN INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT BURLINGTON NORTHERN INC.'S BRIEF IN OPPOSITION

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OPINIONS BELOW

Opinions below are set forth in the Petition except for the Respondents' (Defendants') "Proposed Findings of Fact and Conclusions of Law" which appear as Appendix A, pp. A-1 - A-27.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Were the Appellants placed in a "worse position" in violation of Section 5(2)(f) of the Interstate Commerce Act, the Commission order approving the merger, the Merger Protective Agreement and Implementing Agreement No. 1?

2. Did the Brotherhood of Locomotive Engineers (BLE) breach its statutory duty of fair representation under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, and Burlington Northern Inc. (BN) acquiesce in such conduct?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioners' Appendix C) and Respondents' (Defendants') "Proposed Findings of Fact and Conclusions of Law" (Appendix A, pp. A-1 - A-27).

ARGUMENT

I. Worse Position

Petitioners claim to be in a "worse position" solely because in some instances they do not have enough seniority on the consolidated roster to work the job of their choice or the same job that they worked prior to merger (Petitioners' Appendix A-13). In the parlance of the industry, they do not have their "prior rights" because their union representatives voted instead for a date-of-hire method of seniority (Petitioners' Appendix A-12). They concede there has been no loss of employment, wages, or fringe benefits

(Petitioners' Appendix A-13). They do not contend that they have been placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during such employment. It is clear that to satisfy the Petitioners' contention would require a job freeze, for unless Petitioners' pre-merger jobs were frozen there is no way under any method of consolidation that Petitioners could be guaranteed the same so-called "work opportunity" that they insist they are entitled to.

Brotherhood of M.W.E. v. United States, 366 U.S. 169 (1961), first delineated the type of protections which were encompassed by Section 5(2)(f) of the Interstate Commerce Act. Faced with the question of whether monetary compensation for discharged or displaced employees satisfied the Congressional mandate embodied in the Act, the Court said that it did and rejected the contention that the Section contemplated a "job freeze" for employees on the predecessor lines. It clearly established that Section 5(2)(f) was not concerned with maintaining employment status, *per se,* but rather with insuring that those employees affected by merger would not be placed in a "worse position" with respect to their compensation for, at a minimum, the statutory four-year period.

Norfolk & Western R. Co. v. Nemitz, 404 U.S. 37 (1971), did not alter that position; but rather reaffirmed the Court's prior holding that the purpose of Section 5(2)(f) was not to freeze jobs, but to provide compensatory conditions. Justice Douglas, for the Court, stated at pp. 42-43:

> "We reviewed the history of §5(2)(f) in *Railway Executives' Assn. v. United States,* 339 U.S. 142, and said that 'one of its principal purposes was to provide

mandatory protection for the interests of employees affected by railroad consolidations.' *Id.*, at 148. That 'mandatory protection' can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commission so provides. *Id.*, at 154. *The purpose of §5(2)(f) was not to freeze jobs but to provide compensatory conditions. Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 175-176. In that case we noted that the Commission has consistently followed that practice 'in over 80 cases, with the full support of the intervening brotherhoods.' *Id.*, at 177. And the Commission over and over again has adopted the set of labor conditions contained in collective agreements in discharge of its duty under §5(2)(f). See *Gulf, M. & O. R. Co. Purchase,* 261 I.C.C. 405, 434; *Erie R. Co. Trackage Rights,* 295 I.C.C. 303, 305; *Delaware, L. & W. R. Co. Trackage Rights,* 295 I.C.C. 743, 755-756.

"When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of §5(2)(f) is not, as suggested, read out of the Act. *The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of §5(2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence.* Thus, the significance of the 'notwithstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of §5(2)(f)." (Emphasis added.)

He then went on to approve the holding of the Court of Appeals, at p. 44, that:

"An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by

> the I.C.C. order, but it *may not substantially abrogate employees' rights grounded in an I.C.C. order.*" (Emphasis added.)

Petitioners were guaranteed lifetime employment, or pay in lieu thereof, by the merger agreement (Petitioners' Appendix A-13). The post-merger collective bargaining agreement did not abrogate these protections (Petitioners' Appendix C-30). No petitioner has been denied a job or a job opportunity (Petitioners' Appendix C-30). All that has happened is that some of them, sometimes, do not have enough seniority on the consolidated roster to work the job of their choice.

The Court of Appeals believed that the language in *Nemitz* should properly be limited to the context which engendered it—viz., to those matters which have a direct bearing on insuring that employees who may be adversely affected as a result of a merger or consolidation are compensated in a "fair and equitable" manner (Petitioners' Appendix C-31). Based upon that interpretation, it went on to hold that the lifetime guarantees of wages and normal attrition given to the employees in this case have provided the full measure of protection which Section 5(2)(f) was meant to provide. To hold otherwise, it said, would have the effect of severely emasculating the collective bargaining process both by eliminating the very flexibility upon which such bargaining depends, and interject the Interstate Commerce Commission and/or the courts into matters of substance which have historically been beyond their province, citing *Chicago & N. W. R. Co. v. United Transp. Union*, 402 U.S. 570, 579 n. 11 (1971) (Petitioners' Appendix C-31, 32).

Petitioners acknowledge that "job freeze" is not the intendment of Section 5(2)(f) (Petition, p. 15). The logical result of their argument, however, requires such a determination. But for their inability to hold the same job that they had prior to merger, Petitioners have no complaint whatever. Even the district court recognized that there is no possible way for all consolidated employees to have the same seniority status on a consolidated roster as they previously had on their pre-merger rosters.[1] Thus, in insisting upon retaining their so-called same employment status and work opportunity, Petitioners are insisting upon a job freeze.

Petitioners also ask this Court to determine that the protections afforded are inequitable or other than that contemplated by the Interstate Commerce Commission. The Court of Appeals found in the negative on both counts. It held that given the lifetime guarantees accorded to them, over the term of their employment, the relative seniority rankings of retained employees will have no bearing on their ability to work at a level of compensation at least as great as that which they enjoyed prior to merger. That, said the Court, is all the I.C.C. order contemplated (Petitioners' Appendix C-32).

II. Fair Representation

The thrust of Petitioners' contention of breach of duty of fair representation is that the method of consolidating

1. The district court commented during the trial as follows:

"THE COURT: Well, I have thought about this a lot, and I think about it in this light, Mr. Powell, and that is that the worsening of position in my judgment just, by virtue of the consolidation of rosters in and of itself is going to happen. I just don't see how it is possible to consolidate rosters, seniority rosters, without somebody being in a worse position, and I don't think you can come up with a formula that will be an utopian one. You see what I mean by that?

"Somebody is going to get hurt." (Tr. 722)

seniority rosters adopted (date-of-hire) was inequitable and arbitrary, and that it violated Standing Rule 35 of the Union Constitution (Petition, p. 19). This Court, in *Humphrey v. Moore*, 375 U.S. 335 (1964), held that a Union's decision to integrate seniority lists on the basis of length of service (date of hire) is neither unique nor arbitrary. The trial court did not hold that said method was inequitable (Petitioners' Appendix C-11. The record supports the Court of Appeals' holding that it was equitable. The trial court did hold that there was a violation of Standing Rule 35 of the BLE Constitution, but the Court of Appeals reversed, holding that the method used was well within the wide range of reasonableness which must be allowed a statutory bargaining representative in serving the unit it represents (Petitioners' Appendix C-11). The trial court found neither bad faith nor hostile discrimination on the part of the BLE.

We concur with the Court of Appeals that a review of the legislative history underlying the passage of Standing Rule 35 does not compel a conclusion that only one method of consolidation was permitted. Furthermore, the history of the implementation of Standing Rule 35 dispels any notion that only one method of consolidation can be utilized. In *Price v. Seaboard Coast Line Railroad Company*, 332 F. Supp. 1093 (N.D. Ala. 1970), aff'd *per curiam*, 449 F.2d 1371 (5th Cir. 1971), a modified date-of-hire method, as well as a modified percentage block allocation method, were utilized and approved by the court under the same Standing Rule 35. In *Witherspoon v. Grand Internat. Bro. of Loc. Eng.*, 194 S.E.2d 399 (S.C. 1973), the appellants contended that only the date-of-hire method was permitted under Standing Rule 35 and that the percentage block

method adopted was not permitted. As in *Price, supra,* the court held that the method utilized was not only equitable but within the "wide range of reasonableness granted bargaining agents," and thus not a breach of the Union's duty of fair representation. The court further held that even if a constitutional violation had occurred it would not have the effect of nullifying the collective bargaining agreement between the Union and the merged carrier. The court said at page 403:

> "The record fairly indicates that the BLE and Seaboard entered into the agreement with the good faith and honest belief that, considering all members, dovetail percentage blocking was the most equitable method to consolidate seniority rosters; and that the dovetail percentage blocking method was *one of a number of fair and reasonable methods available.*" (Emphasis added.)

This Court, in *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953), said at page 338:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The *complete satisfaction* of all who are represented is hardly to be expected. *A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents,* subject always to complete good faith and honesty of purpose in the exercise of its discretion." (Emphasis added.)

There is no conflict among the Circuit Courts as to the standard of conduct required for fair representation. The Second Circuit, in *Cunningham v. Erie Railroad Company,* 266 F.2d 411 (1959), said:

> "The arbitrariness shown must be of the bad faith kind . . . Something akin to factual malice must be shown."

The Third Circuit, in *Bazarte v. United Transportation Union*, 429 F.2d 868 (1970), equated arbitrary conduct with bad faith on the part of the Union. The Fifth Circuit, in *Price, supra,* and *Freeman v. Grand International Bro. of Locomotive Eng.*, 375 F. Supp. 81 (1974), aff'd 493 F.2d 628, likened arbitrariness with bad faith or dishonest conduct. The Ninth Circuit, in *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (1962), and in the instant case, applied no different criterion. Petitioners would use a play on words as a basis for contending there is. The use of the words "arbitrary," "discriminatory," or "in bad faith," as stated in *Vaca v. Sipes*, 386 U.S. 171 (1967), does not create a standard different than that of the Circuits. But assuming *arguendo* it did, such a conclusion would not work to Petitioners' advantage. Webster's dictionary synonyms for "arbitrary" are "capricious", "tyrannical", "despotic", "imperious" and "peremptory."[2] "Discriminatory" implies "prejudice against", "partiality in favor of", and "like conduct of less than in good faith or less than fully objective."[3] The record in this case is void of proof of any such conduct or inference of such conduct on the part of either the bargaining agents or the carrier.

Nor is there a conflict among the Circuits with respect to the interpretation of Standing Rule 35. The case of *Cole v. Seaboard Coast Line R. Co.*, 76 LRRM 2529 (4th Cir. 1971), affirming No. 5614 (76 LRRM 2528) (E.D. Va. 1970), as well as *Price, supra,* and *Freeman, supra,* recognized the right to use more than one method of consolidating rosters. This was also recognized in *Witherspoon, supra, Evans v. United Transportation Union* (U.S.D.C.

2. Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, p. 95.

3. Id., pp. 522-523.

Ala. So. Div. 1970), CCH Looseleaf Service at 67 LC ¶12,400, and *Bates v. Locomotive Firemen & Enginemen*, 56 LRRM 2271 (U.S.D.C., M.D. Fla., No. 472, 1964). In *Bates, supra*, the court recognized the Union's authority to enter into the agreement stemmed from the Railway Labor Act, and that such an agreement could not be set aside simply because of a difference in view as to whether the Union Constitution authorized it.

This Respondent initially was not concerned with the method chosen by the employees for consolidation of their seniority rosters and took no part in that determination. It was concerned that by whatever method adopted engineers could be utilized wherever needed within the new enlarged Pacific Seniority District, if it was to pay said engineers guaranteed earnings for life if employment was not available. This requirement itself could result in job shifting if work was not available at a particular point. Thus, a determination that under these conditions employees could still contend that they were entitled to keep their same job or void the consolidated rosters carried not only serious ramifications to the vast majority of engineers employed by the Respondent in the two Western Districts which chose this method, but also to the carrier itself. The district court's decision also placed the integrity of collective bargaining agreements in jeopardy. Neither the facts nor the law required such a result. The Court of Appeals concurred. Its ruling is sound and should be upheld.

CONCLUSION

There is no important question of Federal law requiring review by this Court. The Court of Appeals' decision herein is not in conflict with the decisions of any other Circuit and is consistent with prior decisions of this Court. For the foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CARL LATURNER, *et al*, *Plaintiff*, v. BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Defendants*,	No. 3379 DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs commenced this action on September 15, 1970, against the Burlington Northern, Inc. (BN), and the Brotherhood of Locomotive Engineers (BLE). Plaintiffs' action is grounded on the charge that the defendants, for hostile and invidious purposes, discriminated against them in the negotiation and application of an agreement dated February 10, 1970, merging the seniority rosters of locomotive engineers of the former Great Northern Railway and Northern Pacific Railway in BN's Pacific Consolidated Seniority District No. 5 on a date-of-hire basis as firemen. Plaintiffs further claim that said agreement violates Section 5(2)(f) of the Interstate Commerce Act and the report and order of the Interstate Commerce Commission approving the BN merger in Finance Docket No. 21478, and places each of them in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto, that said agreement violates the prior Protective Merger Agreements for employees represented by BLE, and that said agreement is not in accord with the terms of the Constitution and By-Laws of BLE.

Plaintiffs seek: (1) a declaration that the aforesaid agreement is null and void; (2) an injunction prohibiting defendants from using a "hiring date" engineers roster in BN's Pacific Seniority District as provided in said agreement; and (3) an order directed to the defendants to

enter into an agreement in accordance with the terms of the Constitution and By-Laws of BLE by preferably assigning plaintiffs strict prior rights to all jobs in their former Great Northern Seniority District No. 10 on merger day (March 3, 1970), or by integrating the rosters in BN's Pacific Seniority District on a percentage block allocation basis.

The defendants deny that they or either of them have been at any time guilty of hostile discrimination toward the plaintiffs or have acted arbitrarily or in bad faith; that the agreement of February 19, 1970, violates Section 5(2)(f) of the Interstate Commerce Act, the report and order of the Interstate Commerce Commission relating to the BN merger, or the terms and provisions of the prior Protective Merger Agreements for employees represented by BLE; and that the aforesaid agreement and the resulting consolidated engineers' seniority roster in BN's Pacific Seniority District places the plaintiffs in a worse position with respect to compensation, working conditions, fringe benefits, or rights and privileges pertaining thereto. Defendant BLE further denies that the aforesaid agreement and the resulting date of hire engineers' roster in BN's Pacific Seniority District is not in accord with the terms of its Constitution and By-Laws and that, even if it were, as a product of the collective bargaining process it cannot be set aside unless effectuated for hostile and invidious purposes. The defendant carrier denies knowledge of the requirements of the intraorganizational law and denies that said provisions are binding upon it in the negotiation and execution of collective bargaining agreements as involved herein; and further asserts that the voiding of the February 19, 1970, agreement would thereby eliminate the consolidated seniority district and merged engineers' seniority roster therein, which was the consideration for the prior basic Merger Protective Agreement of June 29, 1965, and would therefore terminate the lifetime guaranteed earnings and employment requirements contained in the latter document.

After a trial without a jury, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs herein have been, since March 3, 1970, employees of the defendant BN, and have been carried on the Pacific District Engineers' Seniority Roster which contains 1,099 names. Prior to that time, the plaintiffs were employed by Great Northern Railway Company (GN) or Northern Pacific Railroad Company, predecessors of the defendant BN, as locomotive engineers and/or locomotive firemen in GN's Spokane Tenth Seniority District and Northern Pacific's Idaho West Division, and were listed on the engineers' seniority rosters for those former seniority districts. Of the 213 named plaintiffs, the majority are members of defendant BLE. The remaining named plaintiffs hold membership in the United Transportation Union, which union is the duly recognized bargaining representative for the craft of locomotive firemen, as well as three other crafts, on the BN. Membership in that organization satisfies the requirements of Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (c), and the union shop agreements in effect between the defendants.

2. The defendant BN is a corporation engaged in interstate commerce as a railroad "carrier" defined in Section 1, Railway Labor Act, 45 U.S.C. § 151, and Section 1 of the Interstate Commerce Act, 49 U.S.C. § 1, and is subject to the provisions of said Acts. BN is licensed to do business within the states of Oregon, Washington, Idaho and Montana, which includes the area covered by the Pacific Seniority District.

3. Defendant BLE is a labor organization under the Railway Labor Act and Interstate Commerce Act and engages in collective bargaining in the railroad industry. The BLE has its principal offices in Cleveland, Ohio, and has done business within the Eastern District of Washington. BLE is and has been the duly authorized exclusive collective bargaining representative under the Railway Labor Act for the craft of locomotive engineers in the employ of BN and its predecessor companies; and collective bargain-

ing agreements between the defendants and the predecessor companies of defendant BN have been in effect for many years governing rates of pay, rules and working conditions for the employees of BN in the craft of locomotive engineers represented by BLE.

4. For reasons of economy and efficiency, on February 17, 1961, Great Northern Railway Company (GN), Northern Pacific Railway Company (NP), Pacific Coast R. R. Co., Chicago, Burlington & Quincy Railroad Company, and Spokane, Portland and Seattle Railway Company (SP&S), all common carriers by railroad, sought permission from the Interstate Commerce Commission essentially to merge the first four named carriers into a new company and a lease by the latter of SP&S. Extensive hearings were held by the Commission at which BLE and the other affected labor organizations presented their opposition to the application, which was identified by the ICC as Finance Docket No. 21478. At that time, the applicant carriers represented to the Commission that they were willing to provide adversely affected employees with the protection of the Commission-imposed conditions set forth in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, as modified in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, 317 I.C.C. 729, and 320 I.C.C. 377. The total cost of said employee protection was estimated at $4.96 million.

5. Under the employee protective conditions which have been fashioned by the ICC, displaced and dismissed employees are described for purposes of receiving protection as those persons deprived of employment or placed in a worse position with respect to compensation and rules governing working conditions as a direct result of the involved merger or transaction. If any employee is so affected within a protective period of four years from the date of the order authorizing the transaction, he is entitled to a monetary allowance during said protective period. After the expiration of the four-year period, the described employee may receive, if applicable, the residuary and reduced monetary benefits under the Washington Agreement of May, 1936. The Washington Agreement provides dismissal allowances equal to sixty percent of average

monthly compensation for up to five years, depending upon length of previous service, to employees who lose their jobs as a result of "coordinations" of railroad facilities plus displacement allowances to make up the difference in earnings for a five-year maximum for employees shifted to lower-rated positions as a result of such "coordinations," and some reimbursement for moving expenses and residence property losses caused by the merger.

The Commission-formulated conditions, as well as the Washington Agreement, require the rearrangement of work forces and the displacement of employees. Any employee failing to exercise his seniority rights to the highest paying job available to him is entitled to no allowance; and any allowance would be reduced by earnings from other employment and benefits from unemployment insurance. Pertinent provisions of the "New Orleans" conditions and of the Washington Agreement are appended hereto as Appendices "A" and "B".

6. On August 24, 1964, the ICC Hearing Examiner recommended approval of the merger application with the aforedescribed employee protective conditions. Various exceptions, including petitions by defendant BLE and other unions, were filed therefrom to the full Commission. In May, 1965, during the pendency of those matters, the BLE and the aforesaid predecessor companies began negotiations on a set of guidelines for the purposes of assuring employment and/or earnings to the employees involved in the merger, who were represented by BLE, expediting the changes in services, facilities and operations involved in the merger, and prescribing procedures for the modification and consolidation of existing schedule agreements to conform to the changes in services, facilities and operations.

7. On June 29, 1965, pursuant to the Railway Labor Act and Section 5(2)(f) of the Interstate Commerce Act, the BLE and the predecessor companies of BN entered into an agreement entitled "Agreement For Protection of Employees Represented by the Brotherhood of Locomotive Engineers in Event of Approval of Merger and Related Applications Filed by Great Northern Pacific and Burling-

ton Lines, Inc.[1] and Other Carriers in I.C.C. Finance Dockets Nos. 21478, 21479 and 21480." Said agreement provides, inter alia, for preservation of employment and lifetime guaranteed monthly earnings based on test period earnings, for limitations on the obligation to take a position requiring a change of residence, and improved moving expenses and other monetary benefits. The monthly monetary guarantee is consistently increased by the percentage of subsequent general wage increases, and there is no reduction in the guarantee by reason of outside earnings. An employee may elect to take, as prior to the merger, a lesser paying job based on his preference to hours or similar conditions; and, in doing so, the employee would only forfeit in any month that portion of his guarantee resulting from his selection. As fully set forth in Section 3 of the agreement, the guarantee is based upon average monthly earnings and average monthly hours worked, so that an employee may receive guarantee monies even though his monthly earnings may exceed his monthly monetary guarantee. The protective conditions obtained therein are the best of its kind obtained and are far better than the protection under the "New Orleans" conditions.

In consideration of these promises and in line with the conditions normally prescribed by the ICC, Section 1 thereof provided for subsequent consolidation and extension of GN, NP and SP&S engineers' seniority rosters and seniority districts on an equitable basis, for an allocation of work on rerouted traffic for CB&Q engineers to participate in the work at facilities to be consolidated at Minneapolis-St. Paul, Minnesota, and Sioux City, Iowa, and for consolidation of present terminals, terminal facilities and switching limits at specified locations.

8. On January 21, 1966, an agreement, entitled "Implementing Agreement No. 1," was entered into by BLE and the predecessor companies, which provided for the merger of the existing seniority districts of GN, NP and SP&S into five consolidated seniority districts, including Pacific Seniority District No. 5, which is the subject of this suit.

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1. The corporate name was changed to "Burlington Northern, Inc." on March 2, 1970.

In Article I., Section 3 of said agreement, provision was made for the consolidation of seniority rosters to be subsequently implemented, such implementation to be based upon each former seniority district's total engine hours and car miles in relationship to the total engine hours and car miles in the consolidated seniority district.

9. Also, on January 21, 1966, a letter agreement was entered into by the defendants, which provided for the cancellation of the June 29, 1965, Agreement and the Implementing Agreement No. 1 by request of any one of BLE's General Chairmen executing the agreement. By mutual agreement of March 21, 1966, the cancellation period was extended from April 1, 1966, to June 1, 1966.

10. On March 31, 1966, the ICC denied the application for merger. In view of expressions of the carrier concerning efforts for reconsideration or appeal, the representatives of the BLE met in Cleveland from April 14-22, 1966, to analyze the statistical information furnished them by the carriers on January 21, 1966, and to discuss interim provisions to consolidate the rosters on the basis of date-of-hire with the manning of diverted runs by the engineers of the respective roads in proportion to the train miles and engine hours of the respective roads based on a six to twelve month period prior to the merger, which proposal was in conformity with the then Section 35(b), Standing Rules of the 1962 version of the BLE Constitution. The interim seniority proposal was submitted as a result of a ruling given at those meetings by then Grand Chief Engineer P. S. Heath that Section 34(c), Standing Rules, required a referendum vote of the membership involved in order to consolidate seniority districts and seniority rosters.

11. SP&S General Chairman William Dunegan, on May 28, 1966, and NP General Chairman G. R. Bichsel and GN General Chairman C. D. Kempf, on May 31, 1966, did proceed to cancel the Merger Protective Agreement and Implementing Agreement No. 1. As a result thereof, Assistant Grand Chief Engineer L. S. Loomis was relieved of this assignment by Grand Chief Engineer Heath.

12. On July 19, 1966, the delegates to the BLE First Quadrennial Convention enacted a new Section 35 of the Standing Rules section of the BLE Constitution to apply

in the event of mergers, consolidations, coordinations, controls, absorptions, diversions of traffic, purchases or any other action whereby separate facilities or operations of railroads are going to be unified. Section (d) thereof provides that the provisions of Section 35 shall prevail over any conflicting provisions of the Constitution in the handling of mergers and the other matters related above.

13. Section 35(a)I.D., of the Standing Rules, entitled "Seniority Districts," now provides:

> "Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the affected Local Chairmen to work out a merger of the Districts and seniority rosters which shall be made on an equitable basis, as follows:
>
> "In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.
>
> "Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. shall make a determination which shall be final and binding."

14. The discussions of the delegates to the 1966 Convention of the BLE established the great deal of flexibility to be accorded the negotiators in devising methods for integrating seniority rosters, and that consideration could be given to many factors, including work productivity statistics, among those referred to in the second paragraph of Section 35(a)I.D., as well as longevity of service, which is the basis of the normal concept of seniority. Said discussions, and the contemporaneous actions of those responsible for the draftsmenship [sic] of the provision as subse-

quently shown, reveal that no singular method for consolidating seniority districts and seniority rosters was provided for therein. In fact, due to the numerous types of transactions that Section 35 was to apply to, no one method for integrating rosters could be, or was, set forth therein.

15. On July 27, 1966, the predecessor companies of defendant BN requested reconsideration by the ICC of its prior report on various grounds, including the reaching of the Merger Protective Agreement of June 29, 1965, with BLE and a similar agreement dated December 14, 1965, with the Brotherhood of Railroad Trainmen, which was the predecessor of the United Transportation Union. These two agreements, which provided for attrition-type protection and lifetime guaranteed earnings along with consolidation of seniority districts and seniority rosters on an equitable basis, were the sole labor protective agreements submitted to the Commission.

16. In view of the pending petition for reconsideration and the requirements of Section 35(a), Mr. Loomis was again assigned to the proposed merger on August 4, 1966, at the conclusion of the 1966 Convention.

17. On September 13, 1966, the defendant BLE and the predecessor companies entered into an agreement providing that the Merger Protective Agreement of June 29, 1965, and the Implementing Agreement No. 1 of January 21, 1966, would again be in full force and effect and "shall now be considered as meeting the requirements of Section 1(a) of the June 29, 1965 Agreement by addition of the following provision:

> "Section 3 of Attachment B of Implementing Agreement No. 1 is amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new districts as outlined therein, and the New Company has no objection to such arrangement, then agreement will be entered into to cover such consolidation of rosters."

18. In submitting his interim report and forwarding a copy of the September 13, 1966 Agreement to the Grand Chief Engineer, the officer assigned, L. S. Loomis, who, in

his capacity since 1964 as the organization's Coordinator of Mergers, appeared before the Constitution and By-Laws Committee and subsequently the Convention on the matter of Section 35, Standing Rules, stated:

> "It is to be noted that the modification of Section 3 eliminates the problems we had encountered in the past as related to arrangements of seniority equities, consolidations, etc. The modification, therefore, is on point and in conformance with Section 35 of the Standing Rules adopted by the First Quadrennial Convention and made effective at 2:00 p.m., July 19, 1966."

19. On August 24, 1967, Loomis wrote to the General Chairman advising that the September 13, 1966 Agreement extends to the General Committees a review of all methods of consolidating seniority. He then set forth an explanation of four proposals for consolidating the seniority rosters. Proposal No. 1 provided for a date of hire method for merging the rosters accompanied by strict prior rights, *i.e.*, engineers from one former seniority district could not displace those engineers in another former district in the "normal exercise" of consolidated seniority. This proposal did not contemplate any adjustment for diverted traffic or loss of work opportunities, nor prevent new hires or junior engineers on one former district forced to another, when the carrier would have been required to hire a new employee in the latter district, from fully exercising their consolidated seniority. Proposal No. 2 was also a date of hire provision with modified prior rights, *i.e.*, prior rights would be adjusted by percentage allocations based upon changes in traffic patterns. Proposal No. 3 set forth a so-called percentage blocking method by which engineers in each former district would be placed into the consolidated roster on the basis of the percentage figure accorded their district as derived from its work allocation to the total of the work brought into the consolidated district by all former districts. To this proposal was also attached a prior right hold-down restriction, *i.e.*, no employee could exercise seniority outside his former district until he no longer could hold any position therein. Proposal No. 4 embodied an unrestricted application of the percentage blocking allocation method. In sum, only two basic meth-

ods for integrating the rosters had been tendered; date of hire, and percentage allocation. These same four proposals had been submitted to the General Chairmen and Local Chairmen involved in the Seaboard Air Line-Atlantic Coast Line merger, which was the first merger to which the newly enacted Section 35, Standing Rules, had been applied.

20. In September, 1967, each of the General Chairmen submitted the aforedescribed proposals and explanatory materials to his Local Chairmen. In the latter part of April, 1968, the NP and GN General Chairmen furnished each Local Chairman in the five consolidated districts with unofficial copies of a date-of-hire roster and a percentage allocation roster.

21. On November 30, 1967, the Interstate Commerce Commission, having granted on January 4, 1967, the predecessor companies' petition for reconsideration, and having reopened the merger proceedings before it, granted the authority requested. In regard to employee protection, the Commission's report referred to the aforedescribed merger protective agreements of June 29, 1965, with BLE and of December 14, 1965, with the Trainmen, as providing "attrition-type protection for employees, plus various monetary benefits, retirement allowances, and protection against loss from sale of homes and cancellation of unexpired leases." The Commission also referred to the fact that the employees covered by said agreements "would receive guarantees and job assurances for the rest of their working lives." Further, the Commission stated that the agreements recognize the right of the merged company "to transfer work throughout the merged system and contemplates the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces."

With respect to the employees represented by BLE and the Trainmen (the craft of trainmen or road brakemen), the Commission held:

> "Under the terms of the last sentence of Section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees

covered thereby. As to them, therefore, we make no requirement for protection, but do find the agreement does not render the proposed transaction inconsistent with the public interest."

As to all other employees, the Commission attached a condition to approval for BN to provide them with the "attrition conditions the same as set forth in the agreements mentioned above," and did so order in Condition No. 34 of its Order.

22. On April 3, 1968, the NP General Chairman and C. D. Kempf, then GN General Chairman, put out a letter to their Local Chairmen claiming that Loomis had informed them that Grand Chief Engineer Heath had ruled in the Seaboard Coast Line merger that a date-of-hire unrestricted method was not in accordance with the BLE Constitution. The other two General Chairmen, along with Loomis, arrived in St. Paul, Minnesota, on the evening of that date in order to prepare for a tour of the entire system to explain the proposed seniority roster consolidations. Upon learning of this letter, Loomis claimed that there must have been some misunderstanding in regard to the actual comments that he had made and those comments had merely related to his personal preferences in using the date-of-hire method. In fact, Grand Chief Engineer Heath had made no such ruling in the Seaboard Coast Line matter, but had approved the use of that method in merging the separate road and yard rosters in the Seaboard Air Line engineers involved in that merger.

23. In order to clarify these understandings, Loomis and the General Chairmen dispatched a telegram to Grand Chief Engineer Heath on April 4, 1968, requesting a ruling on three questions. These were: (a) whether Section 35 required a uniform method throughout the system or whether each consolidated district could adopt a different form; (b) if a different method could be used in each consolidated district, the procedure to be followed in making that determination; and (c) whether a date-of-hire unrestricted roster was proper and equitable.

24. On April 5, 1968, Heath replied by telegram which, in effect, specifically answered the first question only by stating that "the basis for consolidation, whatever is adopted, should be applied to all districts of the merged system."

25. On April 23, 1968, SP&S General Chairman W. D. Dunegan, whose railroad was located solely within the Pacific Consolidated Seniority District No. 5, submitted the following question to the BLE Executive Committee:

> "May each of the five new districts consolidate the seniority districts within the new district by using the method most practical to the new district or must the entire new railroad employ but one and the same method for consolidating all of the existing seniority districts into the five new consolidated districts?"

The Executive Committee is composed of the Grand Chief Engineer, the First Assistant Grand Chief Engineer, and the General Secretary-Treasurer of the BLE.

26. The Executive Committee met on April 29, 1968, at which time Loomis was requested to present his views to it. Later on that date, the Executive Committee ruled "that it would be advisable to modify the position previously taken on the Northern Lines merger requiring a uniform method of roster consolidation over the entire property involved, to the extent that if the majority of the BLE members involved on a consolidated district approved a certain method of consolidating the roster for that particular district, we would not necessarily require them to conform to a different method that may have been approved by a majority of the BLE members on a different consolidated district."

27. This information was then transmitted to Loomis and the General Chairmen on May 6, 1968, at which time Loomis and the GN and NP Chairmen were conducting their informational tour from St. Paul westerly through each of the consolidated districts. At each meeting site, they explained the four proposals and the two seniority rosters which had been furnished the Local Chairmen. At each meeting, they requested the opinion of those attending; and advised that while the ultimate selection was up to the Local Chairmen, it would be worthwhile for all members to indicate their preference to their Local Chairmen. Subsequently, October, 1968, the Local Chairmen of Pacific District No. 5 met at Yakima, Washington, where they considered the four proposals described above plus proposal no. 5 discussed below and a new proposal no. 6 pre-

sented by L. D. Boyles, Local Chairman of the former GN Tenth.

28. When the meeting at the first location in the Pacific District, Seattle, Washington, on May 31, 1968, the GN Local Chairmen came forth with a proposal, which later became known as No. 5 and which, with certain modifications, was adopted in the Pacific District as well as the Rocky Mountain District. This proposal involved the use of a strict date-of-hire consolidation of rosters with a hold-down on the free exercise of seniority throughout the consolidated district for a period of two, three or five years. At that meeting and all subsequent meetings in the Pacific District, no opinion was solicited from the persons attending. In each instance, Loomis advised that the Local Chairmen in the district would have to meet jointly to reach some understanding. In addition, at the Seattle meeting, SP&S General Chairman Dunegan was selected by members in attendance to request a ruling from the Grand Chief Engineer as to the acceptability under the intra-organization law of this proposal. And those persons attending each meeting were advised of this action.

29. On June 8, 1968, General Chairman Dunegan wrote to Grand Chief Engineer Heath, stating:

> "The following question has been raised regarding the Executive Committee ruling: If, after evaluating the statistical information obtained from the involved railroads and studying (sic) various methods of consolidating the seniority rosters, a majority of the affected Local Chairmen favor consolidating the affected seniority rosters by dovetailing by date of hire (firing (sic) date) would this method then be acceptable under BLE law?"

30. In reply on June 11, 1968, Grand Chief Engineer Heath referred to the April 29, 1968, Executive Committee ruling and said, "It was the unanimous decision of this Committee that the majority of the affected Local Chairmen on each of the separate seniority Districts comprising the merged railroad could adopt whatever system the majority favored for the merging of the seniority rosters and, in so doing, such method would not only be acceptable, but would be in full compliance with Brotherhood

Law." Therefore, the question posed by General Chairman Dunegan was said to elicit only one answer—Yes.

31. The above described reply was sent to all Local Chairmen on the NP and GN by their General Chairmen on June 19, 1968, and on July 1, 1968, with the statement by GN General Chairman Kempf that a prior right hold-down is required and is in strict compliance with Brotherhood law and accordingly, the parties were to be governed by the enclosed interpretation.

32. At the September, 1968, Convention of the full GN General Committee, Mr. Kempf was succeeded by R. A. Spengler as GN General Chairman. There was much discussion on the merger problems, and a motion was adopted by the Local Chairmen (Delegates) to hold joint meetings in each consolidated seniority district with their counterparts from the other railroads therein.

33. Shortly after the GN General Committee meeting, four Local Chairmen of BLE Division 5 in the Pacific District called for a joint meeting of Local Chairmen in Pacific District. This meeting was held on October 11 and 12, 1968, at Yakima, Washington. Although several other persons were present, all Local Chairmen, who had exclusive voting rights, were in attendance. Their names, and the BLE division represented, their former seniority district, and the number of engineers on the seniority roster in each former district, were:

NAME	DIVISION NUMBER
G. E. Lew, L.C.	798
T. C. Miller, L. C.	238
W. L. Maddox, L. C.	402
R. J. Edgar, L. C.	147
G. C. Musselman, L. C.	842
J. J. Fleming, L. C.	758
P. M. Bean, L. C.	758
R. A. Ellis, L. C.	758
L. D. Boyles, L. C.	576
J. L. Guerci, L. C.	399

34. At the Yakima meeting, the four proposals previously described were discussed. GN's Local Chairman from Division 798 then advanced a fifth proposal. As

tendered, Proposal No. 5 was based on a strict date-of-hire method for integrating the rosters with a two-year hold-down preventing an engineer from exercising his seniority standing on the consolidated roster during that period unless, if a road engineer, he could not hold a job similar to that held on the date of merger, or, if a yard engineer, he could not hold an assignment in the same starting time bracket.

35. On October 17, 1968, the General Chairmen of the NP, GN and SP&S sent a joint letter to all Local Chairmen in each of the consolidated districts requesting them to submit their preference as to the method to be used in integrating the rosters. Each of the Local Chairmen for Divisions 147, 238, 399, 833 and 758 voted for Proposal No. 5. The Local Chairmen for Division 576 and 798 voted for Proposal No. 6 and Chairman for Division 402 voted for Proposal 4.

36. The above votes representing a majority of the Local Chairmen in the Pacific District were certified to Assistant Grand Chief Engineer Loomis.

37. Subsequently, a number of letters from dissatisfied Local Chairmen and Divisions were sent to the General Chairmen, which letters sought further clarification of the May 6 and June 11, 1968, rulings by Grand Chief Engineer Heath. These were often relayed to the Grand Chief Engineer who reiterated his prior rulings. On February 14, 1969, Assistant Grand Chief Engineer Loomis submitted a lengthy report to Mr. Heath stating all the events that had transpired and submitted questions as to whether he had authority to sign the agreement if a General Chairman refused to sign because of lack of unanimity among his Local Chairmen, as to the approach he was to follow if the carrier demanded application of only one method, and as to the position to be taken if the organization were forced to arbitration of the question. This letter was never responded to, but in view of subsequent events, there was no need to furnish an answer thereto.

38. On February 2, 1970, the United States Supreme Court affirmed lower court decisions approving the order of the ICC authorizing the merger. The effective date of the merger was March 3, 1970.

39. As a result of the impending merger, negotiations were held by BLE and BN from February 15-19, 1970, which led to the agreement of February 19, 1970. The BLE General Chairmen requested that the rosters in the Lake Superior District, Minnesota District and Montana District be consolidated on the basis of the method selected by the Local Chairmen in those districts, *i.e.*, Proposal No. 4, percentage allocation unrestricted. As to the Pacific District and Rocky Mountain District, the General Chairmen sought to dovetail the rosters on a date of hire basis with a two-year moratorium in the former and a three-year semi-restrictive prior right hold-down in the latter. These were the methods selected in those districts. Although defendant BN was agreeable to the use of the two basic methods as prescribed, it opposed any restrictions. However, BN ultimately agreed that it would accept the two-year moratorium on the free exercise of seniority as contained in the proposal accepted by the Pacific District. In addition, it agreed that the limitations period could be extended by mutual agreement of the parties. All of the General Chairmen executed this agreement.

40. Upon learning that the General Chairman for GN had signed the agreement, he was questioned by L. D. Boyles, one of the GN Local Chairmen of 576, as to his authority *to do so*. His authority to execute the agreement was verified by phone and by letter of March 3, 1970, from the Grand Chief Engineer.

41. After the execution of the February 19, 1970, agreement, officers of Division 576 filed certain purported appeals to the Grand Chief Engineer, which were denied on the basis that the consolidation of seniority rosters had been carried out to finality in accordance with the terms of the merger agreements and the internal laws of BLE from which there is no provision for appeal under Section 35, Standing Rules.

42. In both 1970 and 1971, the plaintiffs, and each of them, earned as much or more than they had prior to the merger. Many of the plaintiffs occupy the same jobs as they held at the time of the merger or hold comparable assignments. Some of the plaintiffs who hold different jobs than at the time of the merger do so because of the in-

auguration of Amtrak in May, 1971, which resulted in the discontinuance of all but two passenger trains in each direction each day and the loss of jobs thereby. Through the bumping-back process, a rebidding for available assignments has occurred.

43. None of the plaintiffs have been placed in a worse position as to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto as specified in the June 29, 1965, merger protective agreement, or in a worse position as to employment as set forth in Section 5(2)(f) of the Interstate Commerce Act.

44. Each of those plaintiffs, who have made a claim for the guarantees and have been entitled thereto, have received said guarantees. In addition, said guarantees have been paid in any month when the employee made less than his test period earnings as upgraded or when he has worked more hours than those upon which his test period earnings have been based, even though the employee's earnings exceeded his annual earnings prior to the merger. There has been no modification or abrogation of the guaranteed earnings as specified in the June 29, 1965, merger protective agreement.

45. The defendants herein, and each of them, did not enter into the agreements pertinent hereto for arbitrary or discriminatory purposes and did not apply the provisions thereof in such manner as to violate the duty of defendant BLE, as collective bargaining representative under the Railway Labor Act, to represent fairly all of the employees in the craft of locomotive engineers on BN's Pacific Seniority District.

46. Longevity of service as used in the agreement of February 19, 1970, and in preparing the engineers' seniority roster for the Pacific Seniority District, is a relevant and non-arbitrary consideration and was not used for hostile or invidious reasons. The defendants did not enter into any arrangement for the purposes of benefiting others at the expense of the plaintiffs, nor did they seek to or, in fact, inflict any detriment upon plaintiffs.

47. There is an absence of evidence that the interpretations of Standing Rule 35 were made for fraudulent, arbi-

tary or illegal reasons. Immediately following the 1966 Convention, it was recognized that Section 35 did not provide a single method for integrating the rosters; and Implementing Agreement No. 1 of January 21, 1966, which prescribed a percentage block allocation method and had been cancelled, was reinstituted providing for the use of any equitable method. The productivity factors were disseminated and considered by the Local Chairmen in their consultations between themselves and between them and the General Chairmen; and no more was required by Section 35. In fact, Proposal No. 1, which plaintiffs acknowledge is an appropriate method under Standing Rule 35, does not provide for the use of such factors. Here, after considering the use of methods, some of which employ said factors, a majority (five of eight) Local Chairmen selected a date-of-hire method with a prescribed hold-down period. Their actions appear to have been reasonable in trying to reach a good faith solution to a situation concerning which there could not be complete satisfaction to all concerned.

48. Prior to the merger, most engineers were promoted and received standing on the engineers' seniority roster for their seniority district in sequence of their hiring date as firemen.

49. Each of the engineers in the present Pacific District No. 5 was carried on one of the eight former district rosters. The eight rosters contained the names of approximately 1,099 persons. By reason of their subsequent consolidation, all engineers on the consolidated roster, except the first named, would have a greater, or larger number, than on the former district rosters. However, plaintiffs, as well as all other engineers in the consolidated district, have more job positions available to them in the merged district of BN than were available to them on the seniority district of the predecessor employer. Since the rosters were consolidated on March 3, 1970, some persons have died or retired. Through attrition, plaintiffs' job opportunities have already expanded and will continually improve through the retirement or death of the senior employees.

50. Through the procedures previously described, locomotive engineers generally have seniority standing on the

rosters of both the craft of locomotive firemen and of locomotive engineers. As also noted, the consolidated roster for firemen was based on the percentage allocations to each former seniority district. Except as between employees on the same former seniority district, such roster integration method does not take into consideration longevity of service through employment with one of the predecessor companies. Nor does that type of roster give any weight to the promotion dates of individual engineers.

In comparing the seniority numbers of the BLE date-of-hire roster against the firemen's roster in the Pacific District, it appears that many engineers, including some engineers from the former GN 10th, would stand higher or have better numbers of the latter roster. Conversely, some engineers stand higher, or have better, numbers on the date-of-hire roster used in the craft of engineers. A comparison of the two rosters establishes that these many engineers, including plaintiffs, would stand many places above engineers from other districts who were hired before them and, in many instances, were promoted to engineers earlier. Neither roster without strict prior rights limitations, would prevent engineers with higher ranking or better consolidated seniority standing from bidding for jobs in the former GN 10th district and thereby bumping plaintiffs junior to them from jobs in that former district or "zone." On the other hand, imposition of strict prior rights could eventually prove inequitable to the senior employees in a "zone," in that they would be required to man any position available therein while junior employees could exercise their consolidated seniority for any preferable position available throughout the Pacific District.

51. No provision of the February 19, 1970, agreement for the consolidation of seniority rosters in the Pacific District conflicts with, or is inconsistent with, any provision of the Merger Protective Agreement executed June 29, 1965. The date of hire method used in consolidating the rosters in the Pacific District was accomplished on an "equitable basis" within the meaning of Section 1 of the aforementioned agreement.

52. The Interstate Commerce Commission, in its report and order authorizing the BN merger, did not impose

any specific method of integrating seniority rosters, nor require the consolidation of seniority rosters on a percentage allocation basis. The Brotherhood of Railroad Trainmen, a predecessor to the United Transportation Union, has consolidated on the date-of-hire basis the rosters of the craft represented by it, as has the BLE in the Pacific and Rocky Mountain Districts. Except for BLE in three consolidated districts and two unions representing locomotive firemen and yard switchmen, all other organizations, which represent the eighty-seven remaining groups of employees, have integrated seniority rosters by the date-of-hire method. No evidence of violation of the Commission's Order is involved in this case.

53. No provision of the February 19, 1970, agreement for the consolidation of seniority rosters in the Pacific District conflicts with or is inconsistent with any provision of Implementing Agreement No. 1 as properly amended and placed into effect on September 13, 1966. Specifically, no provision of said February 19, 1970, agreement conflicts with Article 1, Section 3, and Section 3 of Attachment B, "Consolidated Seniority Equities," of said Implementing Agreement of January 21, 1966, as properly amended and reinstated on September 13, 1966.

54. Implementing Agreement No. 1 of January 21, 1966, as amended by agreement of September 13, 1966, and the February 19, 1970, agreement for the consolidation of seniority rosters were reached through properly authorized and binding collective bargaining negotiations. Each of the agreements were entered into and executed by the recognized officers of the BLE in their official capacity and by the authorized officers of the component carriers.

55. There has been no evidence of discrimination on the basis of nonmembership in BLE or on the basis of having been an employee of the former GN; and there has been no evidence of hostile discrimination in this case due to the seniority standing of SP&S engineers or of any General Chairmen or International officers, who may have such status in the Pacific District.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

A. This Court has jurisdiction of this suit and of the parties. The principal claim asserted arises under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, and under the Interstate Commerce Act, 49, U.S.C. §§1, *et seq.* Jurisdiction of the suit exists under 28 U.S.C. §§1331, 1337. The union's constitution is not a "contract" granting this Court independent jurisdiction under 29 U.S.C. § 185. *Hotel & Restaurant Employees Local 400 v. Svacek*, 431 F.2d 705 (9th Cir. 1970).

B. The employee protection conditions contained in the agreement of June 29, 1965, provide protection for employees of BN in the craft of locomotive engineers which is far in excess of the minimal requirements for protection contained in Section 5(2)(f) of the Interstate Commerce Act and in the employee protection conditions normally prescribed by the Interstate Commerce Commission pursuant thereto, or set forth in Condition No. 34 of its Order in Finance Docket No. 21478.

C. The considerations used in the negotiation and administration of the February 19, 1970, agreement for consolidating the seniority rosters in the Pacific District, as required by the June 29, 1965, agreement were relevant and nonarbitrary. The February 19, 1970, agreement provided a fair and equitable method for integrating said rosters.

D. None of the plaintiffs have been placed in a worse position as to employment as set forth in Section 5(2)(f) of the Interstate Commerce Act, nor have they been placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto as set forth in Section 2(c) of the June 29, 1965, agreement, as a result of the February 19, 1970, agreement. See *Broth. of Maintenance Way Employees v. U.S.*, 366 U.S. 1969 (1961). The plaintiffs have suffered no monetary loss or other damages as a result of the negotiation and application of the February 19, 1970, agreement. Said agreement did not vary or abrogate the provisions of the June 29, 1965, merger protective agreement, nor reduce or abolish the protective monetary allowances specified therein. *Norfolk & Western*

Ry. Co. v. Nemitz, 30 L.Ed.2d 198 (1971), bears no applicability to this case. There has been no violation of the Interstate Commerce Act or of Section 5(2)(f) thereto, or of the Commission's Order in Finance Docket No. 21478.

E. None of the defendants herein negotiated or entered into the February 19, 1970, agreement for the purpose of discriminating against the plaintiffs for hostile or invidious reasons, nor have the provisions of said agreements been so applied.

F. The defendant BLE has not violated its duty as the collective bargaining representative for the craft of locomotive engineers, including the plaintiffs, to fairly represent all members of that craft in good faith without hostile discrimination for invidious reasons.

G. The procedures followed by BLE in determining the position to be taken in negotiations with the carrier as to the method for integrating seniority rosters in the Rocky Mountain District were fair and reasonable, and in accord with the procedures set forth in Section 35, Standing Rules of the BLE Constitution; and the provisions of the February 19, 1970, agreement for the consolidation of seniority rosters in that district on a date-of-hire basis are in conformity with the declarations of policy of the BLE regarding merger.

H. The procedures followed by the organization in determining its position at the bargaining table did not amount to proscribed delegation but were in furtherance of the democratic process and the majority views of the membership. In *Hardcastle v. Western Greyhound Lines,* 303 F.2d 182, at 186-187 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962), a merger case, the court said:

> "An essential element, then, necessary to raise a limitation upon a union's discretion in bargaining with respect to seniority rights is a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership. * * *.
>
> "The entire record before this court * * * does nothing more than establish that there is a difference of

opinion between portions of the union membership. * * *

"The appellants herein have done nothing more than present facts showing dissatisfaction with a result adopted by a majority of the union of which the appellants are members. That portion of an electorate will be dissatisfied with the result of an election is a fact inherent in the democratic process and the principal of majority rule."

I. The resolution of the seniority dispute was accomplished within the labor-management relations framework of the Railway Labor Act. In order to protect collective bargaining as encouraged by the national labor policy and to prevent judicial intrusion in the inevitable, continuing seniority disputes that arise in a changing and merger-oriented economy, the bargaining parties have been accorded wide leeway in resolving such seniority disputes. The agreement of February 19, 1970, for the consolidation of seniority rosters in the Pacific District on a date-of-hire basis with a two-year modified hold-down was a product of the collective bargaining process, and is a valid collective bargaining process, and is a valid collective bargaining agreement duly negotiated upon proper authority by the defendants. See *Schick v. N.L.R.B.*, 409 F.2d 395, at 399 (7th Cir. 1969); *Bates v. Broth. of Loc. Firemen & Eng.*, 56 LRRM 2271 (M.D. Fla. 1964). The representatives of BLE had actual and apparent authority to negotiate for the craft of engineers, and the railroad had the right to negotiate with them on that basis. Having had no knowledge of BLE's constitution and having no duty to obtain that knowledge, BN was entitled to rely upon, and did rely upon, that authority in lawfully negotiating the February 19, 1970, agreement and placing the resulting Pacific seniority roster into effect; and the same are binding on the parties.

J. Standing Rule 35 does not prescribe a single method (percentage allocation) for integrating rosters. The interpretation, by the officers of BLE authorized to do so, that Standing Rule 35 permits the merging of seniority rosters on a date-of-hire basis when selected by a majority of the Local Chairmen in the consolidated district was reason-

able, and was not based on arbitrary or irrelevant considerations. The seniority roster in the Pacific District No. 5 is fair and equitable.

This Court does not believe that the Railway Labor Act and the hostile discrimination doctrine were intended to permit the judiciary to intervene at will in the internal affairs of unions or confer general supervisory powers over unions. *Cf. Gurton v. Adams*, 337 F.2d 371, 375 (2d Cir. 1964). In cases solely involving the organization vis-a-vis its members, which this is not, it has oft been cited that the construction of a union's constitution is for the union. Absent fraud, illegality, arbitrariness, or other equivalent actions not appearing in this record, the union's construction of its laws is accepted by the courts. *Couie v. Local No. 1849, Broth. of Carpenters*, 51 Wn.2d 108, 316 P.2d 473, 478 (1957); *Crowley v. Broth. of Loc. Engineers, Div. 28*, 472 P.2d 106 (Ariz. Ct. Apps. 1970). And, in view of the collective bargaining processes relating to this case, the judiciary should not become immersed in the resolution of seniority disputes by substituting its judgment as to the preferability of one seniority roster integration method for another, without findings of "hostile or arbitrary discrimination" based upon wholly irrelevant considerations. *Humphrey v. Moore, supra*, at 349-350.

K. Plaintiffs did not carry the burden of establishing that the defendants, or any of them, hostilely discriminated against the plaintiffs for invidious reasons in the negotiation, consummation or application of the February 19, 1970, agreement. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

In *Humphrey*, the court said:

> "It (the Joint Conference Committee) was entitled under § 6 to integrate the seniority lists on some rational basis, and its decision to integrate the lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitable conflicting interests which arise in the wake

of a merger or an absorption such as here occurred.

* * *

"The Kentucky court, however, made much of the antagonistic interests of the E&L and Dealers drivers, both groups being represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in the supporting the position of one group of employees against that of another.

* * *

"Just as a union must be free to sift out wholly frivoluos grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. *Nor should it be neutralized when the issue is chiefly between two sets of employees.* Conflict between employees represented by the same union is a recurring fact. *To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.*" (Emphasis added.)

In the *Ford* case, it was stated:

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.*" (Emphasis added.)

In *Hardcastle v. Western Greyhound Lines, supra,* the court in the conclusion of its opinion held:

"Collective bargaining representatives have broad discretion to bargain with respect to seniority rights and this discretion should not be interfered with in the absence of some showing that a change in seniority rights resulted from hostile discrimination."

L. Any finding of a breach of the duty of fair representation by the statutory bargaining agent is necessarily dependent upon the subjective mental processes or state of mind of the officials of the organization. See *Encina v. Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971). Acting negligently or exercising poor judgment is not enough to support a claim of unfair representation. *Bazarte v. United Transp. Union*, 429 F.2d 868 (3rd Cir. 1970). In sum, the plaintiffs were required to come forth with evidence establishing "something akin to factual malice." *Cunningham v. Erie R. Co.*, 266 F.2d 411, 417 (2d Cir. 1959). There is no evidence in this record that BLE acted at any time, including the interpretation of its organizational rules and regulations, for fraudulent or hostile purposes; and no breach of the duty of fair representation occurred.

In light of the foregoing findings of fact and conclusions of law, the Court is of the opinion that the relief prayed for should be denied and judgment entered for defendants herein.

Respectfully submitted,

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

DEC 12 1974
MICHAEL RODAK, JR.

Supreme Court of the United States

No. 74-600

October Term, 1974

CARL LATURNER, *et al.*,
Petitioners,

vs.

BURLINGTON NORTHERN, INC. and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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Supreme Court of the United States

No. 74-600

October Term, 1974

CARL LaTURNER, *et al.*,
Petitioners,

vs.

BURLINGTON NORTHERN, INC. and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 501 F.2d 593 and appears at pages C1-C32 of the Appendix to the Petition. The Memorandum Opinion entered by the District Court on February 16, 1972, has not been officially reported, but is unofficially reported at 80 LRRM 2588 and is set forth on pages 21-31, *infra*, of the Appendix to this brief. The Findings of Fact and Conclusions of Law of the District Court are not yet officially reported but appear at 81 LRRM 2408 and on pages A1-A16 of the Appendix to the Petition.

QUESTIONS PRESENTED

Petitioners, 213 dissatisfied former Great Northern and Northern Pacific locomotive engineers out of 1,099 engineers employed in the newly created Pacific Consolidated Seniority District of Burlington Northern, Inc. (BN), brought suit to set aside the seniority roster therein, which had been consolidated on a date of hire basis. They claimed their seniority standings after the railroad merger were not "fair and equitable" since they had been placed in "worse positions" with respect to the kinds of jobs held by them and that, therefore, the merged roster violated Section 5(2)(f) of the Interstate Commerce Act and, in conjunction with their reading of the provisions of the organic laws of the respondent Brotherhood of Locomotive Engineers (BLE), the bargaining representative for the craft of locomotive engineers on BN, constituted hostile discrimination by BN and BLE.

As a result of a Merger Protective Agreement executed by BN and BLE, which was referred to by the Interstate Commerce Commission in its order authorizing the merger, all locomotive engineers employed by BN on the date of the railroad merger have guaranteed lifetime employment and full earnings protection. The District Court found no hostile discrimination to have taken place and no loss of wages or fringe benefits. However, the District Court prohibited the use of a consolidated seniority roster based on hiring dates, and rested this decision on the ground that petitioners were working since the merger at jobs less preferential to them insofar as locations and starting times, and that the BLE's interpretation of its organizational law as allowing it to negotiate hiring date rosters was arbitrary and a breach of its duty of fair representation.

After fully canvassing the record, the Court of Appeals reversed. The appellate court held that since BLE's

laws did not foreclose the use of any particular method of consolidation and since there had been no independent evidence of hostile and invidious discrimination, there had been no breach of the duty of fair representation. The Court of Appeals also held that since Section 5(2)(f) of the Interstate Commerce Act was not designed to freeze jobs or to require employees to be placed in the same or better job positions than prior to merger, the lifetime guarantee of wages and normal attrition received by petitioners provided them with the full measure of protection required.

The question presented is whether the Court of Appeals erred in determining that merging seniority rosters on a date of hire basis, which consolidation did not result in unemployment or loss of earnings, was a "fair and equitable arrangement" and did not result in employees being placed "in a worse position with respect to their employment" as intended by Section 5(2)(f) of the Interstate Commerce Act and, as an "equitable basis" for merging rosters within the meaning of BLE's Constitution and without any evidence of hostility, did not constitute a breach of the union's duty of fair representation.

REASONS FOR DENYING THE WRIT

1. This is merely another case in which employees dissatisfied with the consolidation of seniority districts and their new numbers on the merged seniority lists are claiming that the union representative and the railroad thereby engaged in the hostile discrimination proscribed by the Railway Labor Act and also placed them in a worse position in contravention of the Interstate Commerce Act. This case, therefore, involves no important or novel question of law, but only whether the Court of Appeals correctly assessed the record in applying well-established prin-

ciples of law in a suit brought to set aside a collective bargaining agreement which merged on the basis of longevity of service the locomotive engineers' seniority rosters in a district consolidated as a result of a railroad merger authorized by the Interstate Commerce Commission. Because of the showing in the record that petitioners had not suffered any loss of earnings or employment; that the use of hiring dates was an equitable way to merge rosters; that in view of the broadening of seniority districts with a larger seniority roster, few, if any, engineers would be in the same job positions held prior to merger; that there had been no hostile discrimination; and that a hiring date roster was one of a number of permissible ways to merge seniority under BLE's organic law; the Court of Appeals held the agreement to implement a "date of hire" method for consolidating the rosters following the BN merger was neither inequitable nor in violation of the union's constitution and did not constitute a breach of the duty of fair representation and said method did not place petitioners in a "worse position" in violation of Section 5(2)(f) of the Interstate Commerce Act. Whether the Court of Appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

2. Moreover, the decision below is not in conflict with any decision of this Court.

(a) The ruling below is consistent with this Court's determinations regarding the extent of employee protection needed to comply with Section 5(2)(f) of the Interstate Commerce Act.

At the outset of their argument, petitioners recognize that Section 5(2)(f) does not provide a sufficient basis for their claim (Pet. p. 15), and in an effort to circumvent this Court's prior pronouncements on the subject assert they do not seek a "job freeze." With some ambivalence,

petitioners then contend to have a fair and equitable arrangement within the meaning of that statutory provision (1) the consolidated roster should be fashioned so they will hold the same jobs or better ones than they were working prior to the BN merger, or (2) the former rosters should not be merged, *i.e.*, prior seniority district job or working rights be maintained.

However, in *United States v. Lowden*, 308 U.S. 225, 233 (1939), the first case concerning railroad employees' rights following a merger, this Court recognized that consolidations of railroads necessarily cause dislocations of employees and changes in seniority rights:

> "Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads, are restrictive in their operations to those members of groups who are employed at specified points or divisions."[1]

To minimize these effects upon the employees, respondents entered into a Merger Protective Agreement providing for attrition and lifetime guaranteed earnings in the form of displacement allowances, which attrition conditions were imposed for the protection of all other employees by the Interstate Commerce Commission on the basis that subsequent implementing agreements would con-

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1. As later phrased by the Court of Appeals for the Fifth Circuit, mergers by their "very nature require changes in the status quo" as to seniority districts and roster standings. *Broth. of Loc. Firemen & Eng. v. Seaboard Coast Line R. Co.*, 413 F.2d 19, 25 (5th Cir. 1969), *cert. denied*, 396 U.S. 963 (1969). And the Fourth Circuit has found that employees can anticipate displacement "from their customary positions" by a railroad consolidation. *See, Div. 14, Ord. of RR. Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir. 1962), *cert. denied*, 369 U.S. 813 (1962).

solidate the existing seniority districts and rosters on an "equitable basis" (331 I.C.C. 278-279). Even with this protection, the Commission acknowledged these effects would occur and, in its report granting the requested authority on November 30, 1967, estimated a net loss of 4,500 jobs, mostly in Minnesota and Washington, which "through the so-called bumping process, the number of employees affected would exceed that number" (331 I.C.C. 239, 276).

Notwithstanding the effects to employees contemplated by the authorized operational efficiencies and changes granted BN and even though they have not suffered any loss of earnings and employment (App. A12-A13), petitioners contend the "worse position with regard to their employment" phraseology of Section 5(2)(f) requires there be no displacements or impairment of premerger job rights and, thus, no change or deterioration in job assignments. This reading of Section 5(2)(f), along with the contention that their demand is distinguishable from a "job freeze," is contrary to its legislative history and prior application, and has been consistently rejected by this Court. In *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142, 151-154 (1950), the Court discussed in detail the defeated Harrington Amendment, which proposed for incorporation into Section 5(2)(f) a required "job freeze" by prohibiting the Commission from approving any transaction that would "result in unemployment or displacement of employees of the carrier or carriers or in the impairment of existing employment rights of said employees" (App. C26, n. 33). See also *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (1953), containing a description of the events establishing the doctrine of compensatory allowances to protect employees adversely affected by railroad mergers.

Subsequently, this Court specifically rejected a claim of the rail unions that Section 5(2)(f), as enacted, mandated a "job freeze," including job placements and position rights held at the time of the merger, for a period of at least four years following the effective date of the railroad merger. *Broth. of Maint. of Way Employees v. United States,* 366 U.S. 169 (1961). Contrary to the proposition being advanced by petitioners, this Court held "the purpose of Section 5(2)(f) was not to freeze jobs but to provide compensatory conditions," *Id.* at 176. This view was reaffirmed by the Court in *Norfolk & Western R. Co. v. Nemitz,* 404 U.S. 37, 42 (1971).

In holding "the lifetime guarantees of wages and normal attrition given to the employees in this case have provided the full measure of protection" which Section 5(2)(f) was designed to provide through compensatory allowances, the Court of Appeals was clearly correct in the standard it used in reviewing whether petitioners had been placed in a "worse position" within the meaning of Section 5(2)(f).

Petitioners' claim that the Court of Appeals' decision may conflict with the "logical result of the doctrine announced in *Norfolk and Western R. Co. v. Nemitz, supra,*" is also unavailing. Both the District Court, *infra* at p. 30, and the Court of Appeals determined that the *Nemitz* case decided an issue that is not involved here (App. C30-C31). In *Nemitz, supra,* this Court affirmed a judgment holding invalid a subsequent implementing agreement because the latter document "abrogated the standard of 'compensation' covered by the pre-consolidation agreement which had come under the protective order of the Commission." 404 U.S. at 44-45. Here, unlike the implementing agreement in *Nemitz,* there has been no variance, abrogation or reduction in the compensatory allowances (life-

time guaranteed earnings) provided for in the BN-BLE Merger Protective Agreement of June 29, 1965, which were referred to in the Commission's report and order (331 I.C.C. 277).

Petitioners finally suggest the decision below may be contrary to the rationale of *Nemitz* in that the Merger Protective Agreement referred to deprivation of "employment status,"[2] and also because the Commission described that agreement as recognizing "the right of [BN] to transfer work throughout the merged system and contemplates the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces." (331 I.C.C. 278). Although petitioners collate "employment status" with job assignments and work opportunity and then translate the phrase to seniority, it is clear the term was used to mean that the employee should not be deprived of the state of being employed and would be retained as an employee of the merged company. If the results propounded by petitioners had been favored, the clause would not contain the succinct distinction between deprivation of employment status and being placed in a worse position with respect to all other items, such as compensation, and would have, in turn, interposed "employment status" or "job rights" following "worse position with respect to" and eliminated "rules governing working conditions." That the Commission understood this clause as not representing a

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2. This clause reads: ". . . [N]one of these protected employees of the said carriers shall be deprived of their employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." (Jt. Ex. 1, Sec. 2(c)). Except for the word "status," this provision was identical to its forerunner in the Norfolk & Western merger and involved in *Nemitz, supra.*

"job freeze" is apparent from its remarks about the clause being "attrition protection," meaning "no reduction in force of employees shall occur other than principally by death, retirement, discharge for cause or resignation," and its further statement that the purpose was "to assure employment and/or earnings to employees" (331 I.C.C. 277 & n. 18). That the Commission did not specify a particular method for roster consolidation is clear from the fact that this subject was left to later collective bargaining and from the references in its opinion to the procedures to be followed whereby the parties were to modify existing collective agreements through the negotiation of implementing agreements consolidating and extending districts and rosters for the purpose of expediting the changes in services, facilities and operations resulting from the merger (*id.* at 277-278). The Court of Appeals directly and completely answered each of these contentions with the various factual characterizations placed upon them by petitioners (App. C21 & n. 26; C22 & n. 28). In any manner viewed, these determinations raise no issue warranting review by this Court.

(b) The decision below does not conflict with any decision of this Court applying the hostile discrimination doctrine.

There also is no doubt that the Court of Appeals applied the correct standard in deciding there had been no breach of the duty of fair representation by merging the seniority rosters on a hiring date basis. A breach of the duty of fair representation does not arise out of every action of a union that is contrary to the views of a member of the bargaining unit or which he may believe is inequitable. This was explicitly recognized by this Court in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 331 (1953):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement

affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 331.

Subsequently, speaking on whether seniority rosters merged upon the basis of longevity of service with the former employers could be considered a breach of the duty of fair representation, this Court in *Humphrey v. Moore*, 375 U.S. 335, 347 (1964), said:

> "The power of the Joint Conference Committee over seniority gave it power over jobs. It was entitled under Sec. 5 to integrate the seniority lists upon some rational basis, and its decision to integrate lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here."

In replying to the reasoning of the state court that a hiring date roster had destroyed the employees' accrued rights to existing jobs in violation of the bargaining agreement and representations of the union and that the decision of the union and employers was therefore erroneous, arbitrary and violative of natural justice, the Court said:

> "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some

individuals whom it represents nor in supporting the position of one group of employees against that of another * * *. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

"As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. After Dealers absorbed the Louisville business of E&L, there were fewer jobs at Dealers than there were Dealers and E&L drivers. One group or the other was going to suffer. If any E&L drivers were to be hired at Dealers either they or the Dealers drivers would not have the seniority which they had previously enjoyed. Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duty of fair representation." *Id.* at 349-50.

At the conclusion of the trial herein, the District Court ruled from the bench that there had been presented no probative evidence of hostile discrimination toward petitioners by BLE, nor any acquiescence on the part of BN in any such alleged conduct (Tr. 736, 742-3, 748).[3] Again, at the time of settling the findings, the trial court stated: "Well, there is no hostile discrimination, there was no question about that here" (Supp. Tr. 40). The Court of Appeals stated that it was "not prepared to say that the

3. The transcript appears in Volume II of the Record below.

union has breached its statutory duty of fair representation" on the basis of a disputed view as to the proper interpretation of its organizational law (App. C20). However, the Court of Appeals did, after fully examining the record, determine Standing Rule 35 did not require respondent BLE to utilize a percentage block allocation in consolidating its seniority rosters for the craft of locomotive engineers, and deferred to the views of the union officials since there was no fraud or unfairness in the interpretation (App. C12, C20). Thus, the test employed by the court below was more favorable to petitioners than required by the determinations of this Court.

In *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-300 (1970), the most recent pronouncement on the required elements of the duty of fair representation, this Court said:

> "For such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' Vaca v. Sipes, supra, at 193. There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' Humphrey v. Moore, supra, at 348. Whether these requisite elements have been proved is a matter of federal law. Quite obviously, they were not even asserted to be relevant in the proceeding below."

Continuing in the same tones as to the kind of conduct or actions that would lead to a breach of the duty, the Court stated in terms applicable to this case:

> "* * * [T]he doctrine * * * carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives * * *. If, however, the congressional

policies Gorman seeks to promote are not to be swallowed up, the very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment on the other, needs strictly to be maintained." *Id.* at 301.

Thus, petitioners' claim that the Court of Appeals' decision conflicts with this Court's determination in *Vaca v. Sipes*, 386 U.S. 171 (1967) is inappropriate. That case, unlike this one, involved the failure of a union to progress a grievance through arbitration. Although the claim was subsequently found to have merit, this Court held that there could be no breach of the duty of fair representation unless the union's refusal had been based upon arbitrary, discriminatory or bad faith motivations toward the employee. A full reading of the opinion shows that the honest views of the union, though later proved to be erroneous or caused by poor judgment, are not the hostile or bad faith considerations establishing a breach of the fair representation doctrine. In fact, to read that opinion otherwise, as petitioners suggest, is contrary to the more specific language of this Court under the same factual situation in *Humphrey v. Moore, supra*, in which the Court refused to find a breach or to weaken the collective bargaining process by removing the union from participation in the formulation of seniority rosters.

3. The decision below is not in conflict with any determinations of the various Courts of Appeals.

(a) The test of hostile discrimination applied by the Court of Appeals is in accord with the decisions of the other circuits involving the application of the fair representation duty in seniority integration cases.

Contrary to the assertions of petitioners, the decision below is in conformity with the decisions of the various circuits specifically dealing with the question of hostile discrimination arising out of the negotiation of seniority rosters in merger related cases. Thus, in *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962), the Ninth Circuit approved an agreement replacing divisional seniority with system-wide seniority and depriving employees hired between the date of the merger and the agreement of their accrued divisional rights. That court upheld the result adopted by a majority of the employees in a referendum vote, because there was an absence of "a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership." *Id.* at 185. Similarly, in *Trotter v. Amalgamated Ass'n of Motor Coach Employees, Div. 1303*, 309 F.2d 584, 586 (6th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963), the Sixth Circuit found no breach of the duty of fair representation in requiring suburban drivers to elect to retain their suburban division rights or to transfer to the bottom of the highway division roster because the dissatisfied employees, as the petitioners here, were obviously seeking to "acquire better seniority rights than they already had." See page 18, *infra*. And in *Schick v. N.L.R.B.*, 409 F.2d 395 (7th Cir. 1969), the Seventh Circuit refused to set aside a "compromise" seniority arrangement where the junior meat-hauling drivers, who had longer periods of service with the employer, were transferred to the bottom of the seniority roster for the dry-goods hauling unit on the basis that "in the absense of some showing that a change in seniority rights resulted from hostile discrimination," the product of the collective bargaining system should be upheld.

Finally, it should be noted that the standard used by the Ninth Circuit in the instant case is consistent with the

test applied by it in *Dente v. Masters, Mates & Pilots, Local 90*, 492 F.2d 10 (9th Cir. 1973), *cert. denied*, 41 L. Ed. 2d 214 (1974), and among others the Sixth Circuit in *Dill v. Greyhound Corp.*, 435 F.2d 231 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1970), and the Third Circuit in *Bazarte v. United Transp. Union*, 429 F.2d 868 (3rd Cir. 1970), all of which held that poor judgment or negligence were not the arbitrary or discriminatory considerations requisite of the hostile discrimination doctrine and are therefore in conformity with the rationale expressed by this Court in *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-301 (1970).

(b) Neither is the decision below in conflict with the determinations of the Fourth and Fifth Circuits concerning the merging of the seniority rosters for locomotive engineers in the Seaboard Coast Line Merger. In fact, the Fifth Circuit independently reached the same conclusions as did the Ninth Circuit on the identical issue raised by petitioners.

Again, contrary to petitioners' assertion, the ruling below is consistent with the decisions in *Price v. Seaboard Coast Line R. Co.*, 332 F. Supp. 1093 (N.D. Ala. 1970), *aff'd per curiam*, 449 F.2d 1371 (5th Cir. 1971), and *Cole v. Seaboard Coast Line R. Co.*, 65 C.C.H. Lab. Cases ¶ 11,567 (E.D. Va. 1970), *aff'd*, 64 C.C.H. Lab. Cases ¶ 11,499 (4th Cir. 1971), and were fully considered and properly distinguished by the court below. In that railroad merger, the first in which seniority rosters were consolidated under BLE Standing Rule 35, the same proposals for hiring date rosters and percentage allocation rosters were presented to the local chairmen. There, the road and yard engineer rosters in each former district were separate. It was determined by the bargaining parties that those ros-

ters would first be merged on a hiring date basis, that seniority restrictions in existence at the time of the merger would be continued in parring the rosters, and that the rosters of each former railroad in the broadened consolidated districts would then be integrated on a percentage allocation basis reflecting the work being brought into the merged district on the basis of four factors, only one of which was mentioned in the organic law of the union. In *Price, supra,* certain yard fixture engineers contended that the failure to remove the restriction, which would have permitted them road seniority rights, was arbitrary and a breach of the duty of fair representation. In *Cole, supra,* certain engineers from one of the former railroads claimed BLE had breached the duty of fair representation in not holding a referendum vote, as purportedly required by another provision of the organization's law, and also asserted that the union had acted arbitrarily by using a percentage allocation roster, thereby depriving them of vested seniority rights and by employing the factors used in striking the district percentages. Neither case presented a factual situation involving the consolidation of the rosters on a hiring date basis or the question of whether a roster based exclusively on longevity of service was an "equitable basis" for integrating rosters within the meaning of Standing Rule 35. Both decisions refused to find that the rosters had been merged for hostile and invidious reasons and, consistent with the decision below, used as one of the bases for that decision that the rosters as merged were consistent with the organizational law. It so happened that in each case the complainants were working on the same or similar kinds of jobs, although not in the same time brackets or areas, and were making the same earnings or drawing their guaranteed earning allowances, so that the primary basis for the decisions was the fact that the plain-

tiffs had not been harmed and each was in "the same relative standing or position in regard to work opportunity as he was in prior to the merger," even though their seniority standings had been decreased. *Price v. Seaboard Coast Line R. Co., supra,* 332 F. Supp. at 1097. Thus, contrary to petitioners' claim, the decisions of the Fourth and Fifth Circuits do not stand for the proposition that Standing Rule 35 exclusively provides and requires the use of a percentage blocking allocation roster, for as the Court of Appeals stated (App. C19):

> "The references to Standing Rule 35 having been made in the context of demonstrating the equity of a particular method, we are not willing to accept the argument that these cases foreclosed other methods of consolidation which might have proven equally equitable but which were not as clearly within the express language of the Rule."

The specific issue now raised by petitioners was subsequently met by the Fifth Circuit in *Freeman v. Grand Int'l Broth. of Loc. Engineers,* 375 F. Supp. 81 (S.D. Ga. 1973), *aff'd per curiam,* 493 F.2d 628 (5th Cir. 1974). In that case, the yard engineers on the former Seaboard Air Line Railroad claimed that the separate road and yard rosters should not have been merged by hiring dates and that BLE had breached the duty of fair representation because it had acted in violation of Standing Rule 35 which, as they read it, mandated the exclusive use of percentage allocation rosters and conversely barred the hiring date method. The court in *Freeman, supra,* rejected those arguments and held that BLE had not violated its constitution by integrating the rosters involved by hiring dates. Despite the fact that those plaintiffs used the same authorities as petitioners and relied upon the opinion of

the District Court here, the Fifth Circuit affirmed and cited the *Cole* decision, *supra*, as being consistent with its ruling.

There is, therefore, no conflict in the decision with the cases cited by petitioners, nor is there any conflict in the decisions of the various circuits which needs review by this Court.

4. Finally, it is astonishing that petitioners would contend that the date of hire consolidation is inequitable and the so-called equity roster proposed by them is the only equitable manner in which to merge the rosters. This issue was thoroughly argued and briefed below, and the Court of Appeals found otherwise (App. C11 & n. 13). Among other things, the evidence showed that the roster proposed by petitioners (Jt. Ex. 9) would allow the petitioners advanced ranking, up to several hundred positions, to the detriment of engineers hired out many years before them on other districts; that all the engineers among the petitioners working as such on merger date would stand in the top half of the roster proposed by them; that the most junior man among petitioners on the former Great Northern Spokane 10th district would be working as an engineer so that all of petitioners could by the roster proposed by them be holding jobs as engineers even if they had not been promoted; that those petitioners hired only a few months prior to the merger on March 3, 1970, would be ahead of engineers on other districts hired in the 1940s and 1950s; and senior engineers on other districts would be forced to hold positions in the craft of firemen (helpers) whereas all of the petitioners would be working as engineers.

In this connection, when the over-simplified illustration offered by petitioners is filled in with actual data

from the roster proposed by them, it would in part look like this:[4]

Petitioners' So-Called Equity Roster (Jt. Ex. 9)	Name	Date of Hire (Jt. Ex. 10)	Date of Promotion (Jt. Ex. 10)
780	*W. I. Ingraham*	Mar. 14, 1969	Not promoted
781	W. G. Heath	Oct. 17, 1954	Apr. 30, 1958
782	E. L. Sweem	May 25, 1943	Aug. 25, 1956
* * *			
824	*D. M. Grimmer*	June 28, 1969	Not promoted
825	G. M. Cournyer	Oct. 10, 1943	Sep. 1, 1956
* * *			
833	*R. G. Adams*	Sep. 11, 1969	Not promoted
834	E. L. McLees	Aug. 16, 1950	May 22, 1958
* * *			
840	R. T. Hicks	Oct. 4, 1943	Sept. 4, 1956

Thus, the determinations of the court below, that the hiring date roster is as equitable as the so-called equity roster proposed by petitioners and that to hold that roster is the only valid method for consolidation would emasculate the collective bargaining process and eliminate the very flexibility needed in deciding the equitable basis to be used, raise no issue which warrants review by this Court. The factual situation was fully canvassed by the court below. Whether or not decided correctly—and respondent believes it was—the question is not one meriting this Court's attention.

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4. The italicized names are those of certain petitioners.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION OF THE DISTRICT COURT

(Filed February 16, 1972)

Civil No. 3379

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

CARL LaTURNER, JOHN R. BRITTON, W. L. RICHTER, D. M. LUCHTERHAND, JAMES R. GARNER, WALTER D. BUSH and RICHARD F. DOWNING
Plaintiffs,

vs.

BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants.

MEMORANDUM OPINION

Seniority comes from long hours of toil at one's calling and is coveted in all areas of gainful endeavor.

Judges are familiar with the term and the privileges that flow therefrom. When one loses seniority by virtue of a circumstance over which he has no control, it is no wonder that he is aroused to the point where he strives to regain what it has taken him so long to acquire.

So it is with the 180-odd engineers formerly employed by the Great Northern Railway Company and members

of Local No. 576. These engineers were employed in the area extending from Wenatchee, Washington to Troy, Montana and on intermediate local runs primarily in Eastern Washington.

They are plaintiffs in an action against the Brotherhood of Locomotive Engineers, of which union they are members, and the Burlington Northern Railroad Company, the merged successor to the interests of the former Northern Pacific Railway Company, the Great Northern Railway Company, and the Spokane, Portland and Seattle Railway Company. These engineers complain that the consolidation of the locomotive engineers' seniority rosters of the three former railroads that were merged to constitute the Burlington Northern by the "strict date-of-hire method" is contrary to the provisions of the Constitution, By-Laws, and Standing Rules of the Brotherhood of Locomotive Engineers, and further, that they have been placed in a "worse" position jobwise, as that term is used in the order of the Interstate Commerce Commission authorizing the merger.

The plaintiffs called a number of witnesses to establish their claim that they were in a "worse" position as the result of the use of the strict date of hire method in the consolidation of the locomotive engineers' seniority rosters who testified to an increase in their number on the new seniority list so that they no longer held the same position on the new list corresponding to the one that they held prior to the time of the merged roster. They established by their testimony that men from the other two railroads who had not been promoted from firemen to engineers until a number of years after plaintiffs' promotions from firemen to engineers had acquired a superior seniority status to plaintiffs by virtue of their date-of-hire as firemen. If the date-of-hire as a fireman of the

Great Northern engineer occurred subsequent to the date-of-hire as a fireman of engineers employed by the other two carriers involved in the merger, the Great Northern engineer became junior to his counterpart. Plaintiffs established that a loss of seniority by virtue of the merged roster in effect demoted an engineer who had sufficient seniority to command what is known as a chain gang run, a through freight run from Spokane to Troy, Montana and return, was no longer able to hold such a run but was obliged to accept a switch engine job, while engineers whose promotion date from firemen to engineers on the other railroads, parties to the merger, had occurred after the promotion date of plaintiffs could "bump" the plaintiffs from the jobs they were formerly able to hold. Plaintiffs showed a number of examples of this loss of seniority both by the sequence of numbers on the merged seniority roster involving engineers from all three of the former carriers and by examples of the bumping that had occurred as a result of the merger. These plaintiffs categorized certain jobs as being more desirable than other jobs by virtue of the length of hours required on the job, the layover time at the end of the run, the time of day or night worked by the engineers, and other factors that were directly related to seniority status.

The adoption by the Pacific Division of the strict date-of-hire method of consolidating seniority rosters has an interesting history. This division, prior to merger, consisted of seven different local unions affiliated with the Brotherhood of Locomotive Engineers. Three of the Locals were composed of engineers employed by the Northern Pacific Railway Company, two were composed of engineers employed by the Spokane, Portland and Seattle Railway Company, and two composed of engineers employed by the Great Northern Railway Company. Prior

to the merger of the three railroads into the present Burlington Northern, members working for each railroad had a general chairman who represented all of their local unions and each local union had a local chairman.

The three general chairmen were full time Brotherhood of Locomotive Engineers employees and the local chairmen were working engineers.

After the three railroads had applied to the Interstate Commerce Commission to merge, the national officers of the Brotherhood of Locomotive Engineers recognized the necessity of preparing for the merger in the event it was approved, and engaged in bargaining with the prospective merged company officials concerning the future welfare of its members. An agreement was reached between the Brotherhood of Locomotive Engineers bargaining group and the railroad bargaining group concerning the protective provisions, including wages, fringe benefits and other factors that did not involve seniority. Thereafter, it was necessary to enter into an implementing agreement with the railroad, and the Brotherhood of Locomotive Engineers had to provide the railroad with a consolidated seniority roster of the Pacific Division engineers as a part of the implementing agreement.

Previous to the union's national convention in the year 1966, the Brotherhood of Locomotive Engineers had learned that the method of obtaining membership approval of consolidation of seniority rosters by any formula was cumbersome and unwieldy. With this in mind, the delegates at the 1966 International Convention were asked to amend Rule 35 of the Constitution, By-Laws and Rules of the Brotherhood so that it would no longer require a referendum vote of the affected membership with a two-thirds majority in favor of the proposal.

Rule 35 was amended and it provided, as amended, for adoption of a formula for consolidating seniority rosters by vote of the local chairmen.

The Grand Chief Engineer was now empowered to assign an Assistant Grand Chief Engineer to aid the General Chairman in presenting various plans for merging seniority rosters of the Brotherhood of Locomotive Engineers' members in the several divisions of the railroad to be merged.

Originally the General Chairman and the Assistant Grand Chief Engineer submitted four proposals to the local chairmen representing the seven local unions in the Pacific Division. These proposals presented a percentage block plan, a date-of-hire with prior rights plan, and a plan that included matching engineers according to their seniority on their respective rosters.

Meetings were held in Seattle, Spokane and Pasco with all local chairmen attending. Three of the local chairmen, representing local unions whose members were employed by the Northern Pacific Railway and two from Locals whose members were employed by the Spokane, Portland and Seattle Railway, and two from the Great Northern Railway, attended these meetings. Subsequent to these meetings and the presentation of these four proposals, one or more local chairmen from the Northern Pacific and one from the Seattle Chapter of the Great Northern sent an inquiry to the General Chairman and the Assistant to the Grand Chief Engineer asking if a strict date-of-hire method could be used to consolidate the rosters. Simply stated, the proposal would determine seniority of the members of the Brotherhood of Locomotive Engineers working for the different railroads on their date-of-hire as firemen.

The Brotherhood of Locomotive Engineers' Constitution, Section 7, provides that the power to interpret the Constitution and By-Laws of the union rests with the Grand Chief Engineer.

The Grand Chief Engineer was asked for an interpretation, and he responded to the General Chairman that the Constitution and By-laws prohibited the use of the strict date-of-hire method. At a later date, for reasons that do not appear in the record, the Grand Chief Engineer reversed himself and sent a communication to the General Chairman in which he approved the use of a strict date-of-hire method to consolidate the engineers' seniority rosters. No approval or no vote had been solicited from the local chairmen with respect to the first four plans.

Now a new plan was proposed to the seven local chairmen. This strict date-of-hire plan was approved by a majority of the seven on solicitation by the General Chairman and made a part of the implementing agreement between the merged railroads and the Brotherhood of Locomotive Engineers. Records show that the new plan, the strict date-of-hire method, was more favorable to the engineer employees of the Spokane, Portland and Seattle Railway and the Northern Pacific Railway than the other proposals. The Spokane Local of the Brotherhood of Locomotive Engineers' members employed by the Great Northern, through their chairman, Mr. Boyles, presented Plan 6. It was rejected, and as previously stated, Plan 5 was adopted. The testimony and the exhibits show that plaintiffs have lost seniority by adoption of Plan 5, the strict date-of-hire method, and engineers formerly employed by the Northern Pacific Railway and the Spokane, Portland and Seattle Railway have gained seniority. The plaintiffs have not suffered any loss of wages or fringe benefits.

The plaintiffs have by loss of seniority been required to work on less desirable jobs, i.e., switch engineers instead of through runs on main line freights. Some who formerly held daytime working assignments are no longer able to hold them and are obliged to work on night shifts due to their drop in seniority after merger. These illustrations are typical of the claims by plaintiffs that they have been placed in a "worse" position because of the method of merging the rosters.

The Constitution, By-Laws and Standing Rules of the Brotherhood of Locomotive Engineers contain a provision with respect to merging seniority rosters. It is entitled Rule 35-D, Seniority Districts, and is quoted as follows:

> "Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the affected Local Chairmen to work out a merger of the Districts and seniority rosters which shall be made on an equitable basis, as follows:
>
> "In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.
>
> "Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Execu-

tive Committee of the G.I.D. shall make a determination which shall be final and binding."

Plaintiffs contend that the second paragraph is explicit and that the adoption of a plan that disregards the furnished material is not an equitable plan as that term is defined by the provisions of the Constitution.

They also claim that the Grand Chief Engineer's interpretation of the provisions of Rule 35, Section D, violates the intent of the rule and is arbitrary.

Quaere: Is the seniority provision of Rule 35 subject to interpretation by the Grand Chief Engineer or is it a mandate that seniority rosters can only be merged if the statistical information furnished by the Railroad to the union is included in the merger plan? Is the strict date-of-hire as a fireman method an equitable basis for merging engineer seniority rosters within the contemplation of the rule?

The rule includes the phrase in the last line of the first paragraph: "as follows." When it is said seniority rosters shall be merged on an equitable basis, as follows, what follows?

What did follow was an interpretation by the Grand Chief Engineer of Rule 35, Section D, that a merger of seniority rosters did not require the use of the statistical information furnished by the railroad and that seniority rosters merged on a strict date-of-hire method using the date-of-hire as firemen was in keeping with the language "shall be merged on an equitable basis."

Although the cases hold that the interpretation of the union's Constitution and By-Laws is for the union and courts will not interfere unless the action of the union officials appears to be hostile, arbitrary or intentionally dis-

criminatory, the Washington case cited in support of this ruling, *Couie v. Local Union*, 51 Wn. 2d 108 (1957), determined that the jury was asked to interpret a provision of the union Constitution that was "ambiguous." This is clear when the language used by the Court is examined for the Court stated that "the provision is ambiguous when applied to a member of one Local working under permit from another Local, both of which Locals are governed by the same Constitution, but we do not see that the interpretation urged by the plaintiff is any more reasonable than that adopted by the agents of the union."

The Court has failed to find any case that squarely holds that the union officers may disregard the plain reading of a section of the union Constitution. In this instance, there is no ambiguity in Rule 35, Section D, of the union Constitution.

The colloquy between the proponents of the rule change at the 1966 International Convention of the Brotherhood of Locomotive Engineers with the attending delegates who questioned the advisability of changing the rule indicates a concern about merging seniority rosters of engineers without detailing procedures. In this Court's mind, this is persuasive. In other words, this Court concludes that it was the intent of the delegates to approve a rule change to expedite mergers but to require the use of facts in the preparation of a formula that would do equity to the members involved.

Defendants cite *Bates v. Brotherhood of Locomotive Firemen & Engineers*, U.S.D.C., M.D., Fla., No. 472 (March 7, 1964), in support of defendants' contention that plaintiffs have no remedy because officers and negotiators are not required to negotiate within the framework of their own Constitution and By-Laws. This Court is not in

agreement with the doctrine of that case. This Court concludes that the Grand Chief Engineer was right in the first instance when he advised the General Chairmen that the union Constitution did not permit a merger of seniority rosters of locomotive engineers by date-of-hire as firemen. In fact, seniority as an engineer in many instances has no relation to hiring date as a fireman, and that is what has caused the inequities in this case.

Price v. Seaboard Coast Line Railroad Co., 332 F.Supp. 1093 (1970), may be distinguished because the plaintiff engineers in the instant case are not in the same relative standing or position with regard to work opportunity as they were prior to the merger.

Opportunity to work on a night switch engine is not the same as opportunity to work on a day run or a through run or a local run.

The Court, in *Price, supra,* found that the use of the statistical information furnished by the railroad relative to the number of trains, car miles, train miles, and yard engine hours or inboard car count in consolidating seniority rosters when the dovetail percentage blocking method was used placed each engineer involved in the same relative standing or position in regard to "work opportunity" as he was prior to the merger. *Price, supra,* approved a method contemplated by Rule 35. In the instant case, plaintiffs were placed in a poorer position in regard to "work opportunity" because of the use of the "strict date-of-hire as firemen method."

Norfolk & Western Railroad Co. v. Nemitz, ... U.S. ....., 30 L.Ed. 2d 198 (1971), decides an issue that is not involved in the instant case.

The action of the Grand Chief Engineer and the General Chairman in implementing the basic agreement by incorporating the strict date-of-hire method for merging the Pacific Division engineers seniority rosters on a strict date-of-hire method as firemen was arbitrary, and the relief prayed for by the plaintiffs should be GRANTED.

Plaintiffs have requested that the railroad defendant be enjoined from using the present date-of-hire as firemen seniority roster, and the Court will enjoin the use of said roster but stays the implementing of its injunction for a period of sixty days to enable defendants to apply for relief before the Circuit Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

DONE BY THE COURT this 14th day of January, 1972.

/s/ WILLIAM N. GOODWIN
United States District Judge